No. 89-320

Supreme Court, U.S.
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UNITED STATES SUPREME COURT

October Term 1988

RICHARD T. HAYES and LAURIE HAYES
Petitioners

v.

TOWN OF ORLEANS
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

Petition for Writ of Certiorari

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STATEMENT OF THE ISSUES

The issues contained in this appeal are:

I. Whether or not the Court of Appeals properly ruled that petitioners' appeal was wholly without merit and that respondent was entitled to double costs. Subsidiary questions involved in this issue are:

(A) Whether or not the District Court erred in granting a motion for summary judgment on behalf of the Town of Orleans in its order dated July 13, 1988 and in its finding that appellants failed to meet their burden of showing that there is a genuine issue of material fact remaining to be litigated regarding the existance of a policy or custom of the Town's policymakers which caused appellants to be subjected to the deprivation of their constitutional rights,

(B) Whether or not the Town of Orleans should have brought its motion under Fed.R.Civ.P. 12(b)(6) instead of under Fed.R.Civ.P 56,

(C) If there was noncompliance on the part of the Town of Orleans with the Local

Rules of the United States District Court for the District of Massachusetts, Rules 17 and 18, whether or not the District Court should have denied its motion for summary judgment on that basis, and

(D) Standards for appellate review of a summary judgment decision are the same as those for the district court.

II. Whether or not there was merit to respondent's arguments that summary judgment in favor of the Town was warranted because its police officers were found not liable for civil rights violations against the petitioners.

III. Whether or not the Court of Appeals' ruling that petitioners' forfeited their right to defeat summary judgment because they did not file a Rule 56 (f) affidavit was a proper basis for denying petitioners' appeal.

LIST OF PARTIES

Richard and Laurie Hayes, Willis Park Road, Bridgton, ME 04009

Town of Orleans, Orleans, Massachusetts

TABLE OF CONTENTS

		Page No.
1.	Statement of the Issues	1
2.	List of Parties	3
3.	Table of Contents	4
4.	Table of Authorities	5
5.	Reports of Opinion	9
6.	Statement of Jurisdiction	10
7.	Statutory Provisions	11
8.	Statement of the Case	12
9.	Argument	18
10.	Appendix	32

TABLE OF AUTHORITY

Petition:

City of Los Angeles v. Heller, 106 S.Ct. 1571 (1986) at page 27

Federal Practice and Procedure, Section 1356 at page 590, n. 32 at page 23

Dunscombe v. Sayles, 340 F.2d 311 (5th Cir., 1965)

Heller v. Bushey, 759 F.2d 1371 (1985) at page 28

Limerick v. Greewald, 666 F.2d 733 (1st Cir. 1981) at page 22

Moore's Federal Practice, para. 12.08 by Write and Miller at page 23

Rape v. Lucey, 488 F.2d 748 (1st Cir. 1973) at page 22

Rogen v. Ililon, 361 F2d. 260, 266 (1st Cir. 1966) at page 26

Willens v. University of Massachusetts, 570 F.2d. 403 (1st Circ. 1978) at page 26

United States Court of Appeals Appendix

Ayala v. Secretary of HEW, 51 F.R.D. 505, 507 (D.C.Puerto Rico 1971) at page 69

Barr V. Matteo, 360 U.S. 564, 79 S.Ct. 1335 (1959) at page 77

Bennet v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) at page 16

Blenke Bros. Co. v. Ford Motor Co., 217 F.Supp. 459 (N.D.Ind. 1963) at page 68

Bloomingarden v. Coyer, 156 U.S.App.D.C. 109, 479 F.2d 201 (1973) at page 68

c.f. Forand v. O'Brien, 602 F. Supp. 1182 (D. Mass) 1985 at page 10

City of Oklahoma City v. Tuttle, 105 S.Ct. 2427, 2436 (1985) at page 9

Coleman v. Johnson, 247 F.2d 273 (7th Cir. 1957) at page 78

Eiland v. Hardesty, 564 F.Supp. 930, 933 (D.C. Ill. 1982) at page 79

Flli Moretti Cereali S.p.A. v. Contental Grain Co., 563 F.2d (2d Cir. 1977); at page 69

Forand v. O'Brien, 602 F.Supp. 1182, 1186 (D.C. Mass. 1985) at page 80

Grandstaff v. City of Borger, Texas, 767 Fed.2d 161, 170 (5th Cir. 1985) at page 10

Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975); at page 16

Hall, et al, v. Ochs, et al, 15 M.L.W. 1342 (1987), at page 14

Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961) at page 78

Hardings Co., Inc. v. Jones & Laughlin Steel Corp., 164 F.Supp. 75 (W.D.Pa. 1958) at page 68

Harlow v. Fitzgerald, 457 U.S. 800, (1978) at page 75

Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959) at page 78

Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958) at page 78

Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973); at page 78

Langurand v. Hayden, 717 F.2d 220 (5th Cir. 1983) at page 79

Layne v. Vinzant, 657 F.2d 468, 471 (1st Cir. 1981) at page 9

Losch v. Borough of Parkesburg, 736 F.2d 903, 909 (3d Cir. 1984) at page 76

Monell v. New York City Depart. of Social Services, 436 U.S. 658 (1978) at page 23

Norwell v. City of Cincinnati, 414 U.S. 14, 94 S.Ct. 187 (1973) at page 77

Pembaur v. Cincinnati, 106 S.Ct. 1292, 1293 (1986) at page 10

Pinto v. Nettleship, 737 F.2d 130, 132 (1st Cir 1984) at page 9

Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962) at page 16

Rivera Morales v. Benitez de Rexach, 541 F.2d. 882 (1st Cir. 1976) at page 69

Selico v. Jackson, 201 F.Supp. 475, 478 (D.C. Cal. 1962) at page 77

Shillingsford v. Holmes, 634 F.2d 263 (5th Cir. 1981) at page 78

Short v. J. R. Watkins Co., 122 F.Supp. 244 (D.C.Minn. 1954) at page 68

Spell v. McDaniel, 591 F. Supp. 1090, 1109, (D.C.N.C. 1984) at page 79

Staffin Lewis Corp. v. Rose Derry Co., 9 F.R.D. 704 at page 69

United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993 (1962) at page 16

U.S. v. Matheson, 532 F.2d 809 (2d Cir. 1976) at page 69

Walgren v. Howes, 482 F.2d 95 (1st Cir. 1973) at page 69

Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984) at page 16

Wessinger v. Southern Ry. Co., Inc., 438 F.Supp.1256 (D.C.S.C. 1977) at page 69

REPORTS OF OPINION

Order of the United States District Court for the District of Massachusetts dated July 13, 1988 granting summary judgment for the respondent, see appendix at page 37

Judgment of the United States Court of Appeals for the First Circuit dated March 2, 1989 affirming decision of District Court, see appendix at page 41

STATEMENT OF JURISDICTION

The decision sought by petitioners to be reviewed was entered on March 2, 1989 at the United States Court of Appeals for the First Circuit. This petition is being brought under the provisions of 28 U.S.C. 2101, 2106 and Rule 17(c) of the Supreme Court Rules.

STATUTORY PROVISIONS

1. 42 U.S.C. 1983, see Appendix at page 33

2. Rule 17 of the Local Rules of the United States United States District Court, see Appendix at page 34

3. Rule 18 of the Local Rules of the United States District Court, see Appendix at page 34

4. Rule 56 of the Federal Rules of Civil Procedure, see Appendix at page 35

5. M.G.L.A. Chapter 111B, sections 3 and 8, see Appendix at page 35

STATEMENT OF THE CASE

This is an appeal by the petitioners of a decision by the United States District Court for the District of Massachusetts on July 13, 1988 granting a motion for summary judgment in favor of the respondent Town of Orleans (referred to as the "Town") and of the United States Court of Appeals for the First Circuit on March 2, 1989 upholding that decision.

This case arose as a result of an incident which occurred on or about September 14, 1985 in Orleans, Massachusetts where the petitioners, who are husband and wife, had attended an anniversary party for parents of Laurie Hayes.

While returning from the party, petitioners got a flat tire, and when they could not fix it, they decided to walk the remaining mile or so to where they were staying for the evening. As they were walking, they were detained and taken into protective custody as incapacitated persons by Ernest Butilier, a police officer for the Town of Orleans.

After arriving at the Orleans Police

Station, a scuffle ensued, and petitioners were badly beaten by several members of the Orleans Police Department including Ernest Butilier and Richard Jones. Richard Hayes was arrested and charged with two counts of assault and battery on a police officer.

Laurie Hayes was held overnight in protective custody. However, Richard Hayes was acquitted of the charges against him by a jury of six on May 20, 1986.

On or about December 18, 1986, the petitioners filed an action in the district court against the Town and against two police officers employed by the Town, Ernest Butilier and Richard Jones, for assault, battery, false imprisonment, false arrest, intentional infliction of emotional distress and violation of civil rights under 42 U.S.C. 1983. The defendant Butilier and Jones filed counter-claims against Richard Hayes for assault and battery. Court of Appeals Appendix p. 5.

Petitioners claimed, among other things, that they were detained illegally in violation of their civil rights because Officer Butilier

had no probable cause to place them in protective custody because they were not "incapacitated" as defined by the Massachusetts protective custody statute M.G.L.A. Chapter 111B. sections 3 and 8.

A key element of their claim was that Officer Butilier had testified in two prior criminal proceedings that petitioners were merely walking and talking at the time he detained them and that he did not make a determination as to whether petitioners were under the influence of alcohol at the time he put them in his police cruiser and placed them in protective custody. Court of Appeals Appendix pp. 87 and 94.

On May 26, 1987, the Town filed a motion for summary judgment and a supporting memorandum. Court of Appeals Appendix pp. 7-11. The Petitioners filed their memorandum in opposition to the Town's motion for summary

judgment with their supporting affidavit on June 23, 1987. Court of Appeals Appendix pp. 12-19.

The Town then filed a second motion for summary judgment and memorandum on September 15, 1987 with the codefendants, Jones and Butilier. Court of Appeals Appendix pp. 20-65. On or about October 22, 1987, the petitioners submitted their opposing memorandum. Court of Appeals Appendix pp. 67-126.

Following the court's denial of the motions for summary judgment for failure to comply with Rule 18 of the Local Rules of the United States District Court for the District of Massachusetts and for failure to provide a concise statement of material facts demonstrating no genuine issues remaining to be tried, the Town and codefendants filed their motion for reconsideration and a writing entitled "Defendants' Submission of Undisputed Material Facts Pursuant to Local Rule 18". Court of Appeals Appendix pp. 127-131.

However, subsequently on December 7, 1987,

the court ordered the defendants to file by January 8, 1988 "a concise statement of the material facts as to which (defendants) contend there is no genuine issue to be tried, with page references and other documentation". Court of Appeals Appendix p. 132.

When the Town and codefendants failed to comply with said order, the Petitioners filed a motion requesting the court to deny summary judgment for failure to comply with Rule 18 and with the order of the court on December 7, 1987. Court of Appeals Appendix pp. 133-134.

The Town also failed to oppose Appellants' motion as required by Rule 17, which is evidenced by the docket entries of the district court proceeding. Court of Appeals Appendix pp. 1-4.

On July 13, 1988, the court made an order granting summary judgment in favor of the Town. Court of Appeals Appendix pp. 135-137. A timely appeal was entered at the United States Court of Appeals for the First Circuit, and following oral arguments, the United States Court of Appeals on March 2, 1989 rendered a

decision upholding the district court's order and entering double cost to petitioners. Appendix p. 44-46.

The petitioners are petitioning this Court for a writ of certiorari to review and reverse the decisions allowing summary judgment in favor of the respondent, and to order that a trial on the merits of petitioners' complaint against the respondent be scheduled at the first possible opportunity at the United States District Court for the District of Massachusetts. Petitioners also ask that they be allowed to amend their complaint to cure defects, if any, which might be grounds for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE COURT OF APPEALS WAS WRONG IN ITS DECISION THAT PETITIONERS' APPEAL WAS WHOLLY WITHOUT MERIT AND THAT RESPONDENTS ARE ENTITLED TO DOUBLE COSTS.

Rule 38 of the Rules of Appellate Procedure provides that:

> "If a court of appeals determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Petitioners argue that their appeal was not frivolous in accordance with the leading cases on this issue. See Dunscombe v. Sayle, 340 F.2d 311 (5th Cir., 1965), cert, den., 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965); Lowe v. Willacy, 239 F.2d 179 (9th Cir., 1956);

Petitioners state that the following arguments which were presented to the Court of Appeals by way of their brief demonstrate that their appeal had merit and that the Court was wrong in its ruling against them:

(A) THE DECISION GRANTING SUMMARY JUDGMENT FOR THE TOWN WAS WRONG BECAUSE PETITIONERS MET THEIR BURDEN OF SHOWING A GENUINE ISSUE OF MATERIAL FACT REMAINING TO BE TRIED.

Petitioners state that by way of their memoranda to the district court, trial transcripts of state criminal proceedings, and by way of their supporting affidavit, they have established the existence of a material fact remaining to be litigated with respect to their claim of violation of their constitutional rights under 42 U.S.C. 1983 capable of defeating the Town's motion for summary judgment. Court of Appeals Appendix pp. 12-19, 67-126.

In their memoranda, petitioners demonstrated:

a). that summary judgment for the moving party must be denied if the pleadings, the discovery and the affidavits presented to the court show the existence of a genuine issue of material fact remaining to be tried, Court of Appeals Appendix pp. 15-17, 69-69,

b). that there were genuine issues of material fact remaining to be tried, Court of

Appeals Appendix pp. 15-19, 69-72, 78-81,

c). that the affidavit submitted by the petitioners clearly alleges behavior on the part of the Town constituting an independent violation of civil right, Court of Appeals Appendix pp.15-19, and

d). that in deciding a motion for summary judgment, the court is required to look at the record, the pleadings, transcripts and affidavits in a light most favorable to the party opposing the motion and to indulge all inferences favorable to that party, Court of Appeals Appendix pp. 15-17, 68-69.

Petitioners state that, coupled with their pleadings, the affidavit in which they allege failure on the part of the Town to properly discipline its police officers clearly created an inference or presumption which was sufficient to establish a material fact remaining to be litigated and defeat the Town's motion for summary judgment.

On that basis, the district court should have denied summary judgment and allowed petitioners to explore this issue by way of

discovery which had been stayed pending the outcome of the motion.

(B) THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE FED.R.CIV.P 56 WAS NOT APPROPRIATE IN THIS SITUATION.

Petitioners further contend that there is a real question as to whether or not a motion for summary judgment was appropriate in challenging the civil rights claims against the Town prior to trial or whether the appropriate relief was by way of a motion under Rule 12(b)(6).

The Town stated in its memorandum in support of its motion for summary judgment with respect to Appellants' complaint that "This generalized allegation, if indeed it is an allegation at all, is wholly insufficient to impose liability on the Town of Orleans".

Petitioners argue that this attack is clearly with respect to the sufficiency of Appellants' pleadings and, as such, should have been pursued by way of a motion to dismiss under Rule 12(b)(6), failure to state a claim upon which relief can be granted. Rape v. Lucey, 488 F.2d 748 (1st Cir. 1973), Limerick

v. Greenwald, 666 F.2d 733 (1st Cir. 1981).

It is by way of a motion to dismiss that a defendant should test the sufficiency of a complaint and not be way of summary judgment. Moore's Federal Practice Para. 12.08, Write and Miller; Federal Practice and Procedure Section 1356 at 590 n.32.

For these reasons also, summary judgment should have been denied.

(C) THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE TOWN BECAUSE OF THE TOWN'S FAILURE TO COMPLY WITH THE ORDER OF THE COURT AND WITH LOCAL RULES 17 AND 18.

As previously mentioned in the Statement of the Case, the Town failed to comply with an order of the court dated December 7, 1987 requiring it to file a concise statement of material facts pursuant to Local Rule 18 of the Local Rules of the United States District Court for the District of Massachusetts as to which the Town contends there is no genuine issue to be tried. Court of Appeals Appendix pp 2-4, 132-134.

During oral arguments before the court on July 12, 1988, Petitioners contended that this

blatant failure to comply with the court's order constituted grounds for denial of the summary judgment. However, the district court in its decision on July 13, 1988 did not address this issue. Court of Appeals Appendix p. 135.

Petitioners argue that the Town's failure to comply with the court order and with the provisions of Local Rule 18 to demonstrate the absence of a genuine issue of material fact was an appropriate basis for denial of summary judgment.

Furthermore, the writing filed with the court by the Town on November 9, 1987 entitled "Defendants' Submission of Undisputed Material Facts Pursuant to Local Rule 18" clearly does not comply with the provisions of the rule and the dictates of the order, and the Town should not be have been allowed to rely on this writing to support its request for summary judgment. Court of Appeals Appendix pp. 128-131.

Petitioners argue that, in fact, the order of December 7, 1988 requiring the Town to file

a statement pursuant to Local Rule 18 demonstrates that the court did not consider the writing filed by the Town previously on November 9, 1987 sufficient to support summary judgment or in compliance with the provisions of Local Rule 18.

At the very least, the Town should have filed a motion with the court requesting that it accept the writing as compliance with the December 7th order and that motion should have been made in a timely fashion prior to the deadline for filing on January 8, 1988. In addition, the Town also failed to file opposition under Local Rule 17 to Appellants' motion to deny summary judgment on the basis of noncompliance with the December 7th order. Court of Appeals Appendix pp. 1-4.

Petitioners argue that the Town should not have been allowed to flagrantly ignore the order of the court and the provisions of Local Rules 17 and 18, and state that summary judgment should also have been denied on that basis.

(D) THE STANDARDS FOR APPELLATE REVIEW OF A GRANTING OF SUMMARY JUDGMENT IS THE SAME AS THAT OF THE TRIAL COURT.

The standard for review on appeal is the same as that as the trial court in ruling on a motion for summary judgment. Willens v. University of Massachusetts, 570 F.2d 403 (1st Cir. 1978).

The court in Rogen v. Ililon Corp., 361 F.2d 260, 266 (1st Cir. 1966) wrote that "The standard for review is rigorous and not even one chink in the armor of the decision can be vulnerable to the question: Taking the facts and inferences most favorable to the los ing party, would a trier of fact nevertheless have to find against him?" (Emphasis added.)

Petitioners argue that the standards were not met by the district court and that for the reasons stated above, the court erred in granting summary judgment in favor of the Town. Therefore, the decision of the Court of Appeals was wrong in finding the petitioners' appeal was frivolous, in upholding the decision of the district court allowing summary judgement for the respondents, and in awarding double costs

for the appeal to the respondent.

II. RESPONDENT MISAPPLIED THE LAW IN ARGUING THAT IT WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE ITS POLICE OFFICERS WERE FOUND TO BE NOT LIABLE TO THE PETITIONERS FOR CIVIL RIGHTS VIOLATIONS.

In its brief to the Court of Appeals and during oral argument, respondent cited City of Los Angeles v. Heller, 106 S.Ct. 1571 (1986). See Brief of Defendant, Appellee pp. 14-16.

Although not specifically mentioned in the decision by the Court of Appeals, this case as it applies to petitioners' appeal was discussed in detail during oral argument, and petitioners contend that it had a direct influence in the Court's ruling.

In Hella, supra, the United District Court for the Central District of California granted summary judgment in favor of the City of Los Angeles following a bifurcated trial in which its police officers were found not liable to the plaintiff for civil rights violations. The district court reasoned that if the police officers are found not liable for a civil rights violation, the municipality cannot therefore be held liable for violations of

civil rights arising out of the same incident.

The United States Court of Appeals for the Ninth Circuit in Heller v. Bushey, 759 F.2d 1371 (1985) reversed the summary judgment ruling by the district court on the basis that where a good faith, "qualified immunity" defense is used by the police officers, the municipality could be found liable for violations of civil rights even though its police officers were found not liable.

The court reasoned that the municipality could be found liable for the creation of a municipal policy which violated the civil rights of the plaintiff because the police officers could be found not liable on the basis that they were merely following orders were acting in "good faith" in complaince with the illegal policy of the municipality. Petitioners argue that for this reason summary judgment should not have been entered automatically in favor of the Town of Orleans.

Plaintiffs further argue that Heller, supra, is clearly distinguishable from the case at hand because in the Heller case the district

court entered summary judgment for the municipality after its police officers were found not liable. In this case, summary judgment was entered for the Town of Orleans before its police officers were found not liable.

This is an important distinction because this justification for summary judgment did not exist at the time it was granted in this case by the district court, and, therefore, the Court of Appeals should not be allowed to uphold the district court's decision based in this Court's ruling in Heller.

III. THE APPEALS COURT RULING THAT PETITIONERS DID NOT FILE A RULE 56(F) AFFIDAVIT WAS NOT A PROPER BASIS FOR DENYING THEIR APPEAL.

Rule 56(f) of the Federal Rules of Civil Procedure provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essental to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order that is just."

Petitioners argue that the reason they did not file an affidvit under Rule 56(f) was because they did file an affidavit as part of their memorandum opposing summary judgment for the respondent. Court of Appeals Appendix pp. 18 and 19.

In their affidavit, petitioners stated that from their own personal knowledge no investigation into the incident in which they received a severe beating at the hands of the Orleans Police Officers was conducted either by the Orleans Board of Selectmen, by the Orleans Police Chief or by any other town official even after Richard Hayes was acquitted of all charges against him. Petitioners further stated under the pains of perjury that town officials were aware of the incident and of the injuries they sustained as a result of the incident.

They concluded with their statement that as a result of the Town's failure to investigate and to institute disciplinary proceedings in this situation, it is their belief that a policy existed by the Town at the

time of the incident that "precipitated the occurance of the incident and of the injuries to us and of the violation of our (civil) rights". See "Plaintiffs' Memoradum in Opposition to Defendant Town of Orleans' Motion for Summary Judgment", Court of Appeals Appendix pp. 12-19.

Petitioners contend that their affidavit established a genuine issue of material fact remaining to be litigated against the respondent sufficient to defeat respondent's motion for summary judgment. As a result, the Court of Appeals was wrong in upholding the trial court's finding in favor of the respondent in its order for summary judgment, and that decision should be reversed.

Therefore, for the reasons stated above, petitioners ask that the Order of July 13, 1988 by the United States District Court for the District of Massachusetts granting summary judgment for the petitioners and the decision of the United States Court of Appeals for the First Circuit dated March 2, 1989 upholding

that decision be reversed, and that Petitioners be allowed to pursue their claim against the Town through discovery and by way of a full trial on the merits.

The petitioners also ask that they be allowed to amend their complaint so as to be able to cure defects, if any, in their pleading which might give rise to a motion to dismiss under Fed.R.Civ.P 12(b)(6).

Respectfully submitted,

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May 31, 1989

APPENDIX

42 U.S.C. §1983 provides:

> Every person who, under the color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

LOCAL RULE 17

Local Rule 17(a)(2) provides: "Submission of Opposition to a Motion. A party opposing a motion other than a motion for enlargement of time or a motion related to discovery, shall file an opposition to the motion within fourteen (14) days after service of the motion, unless another period is fixed by rule or statute, or by order of the court, and in the same rather than a separate document a memorandum of reasons, including citation of supporting authorities, why the motion should not be granted. Affidavits or other documents setting forth or evidencing facts on which the opposition is based shall be filed with the opposition."

LOCAL RULE 18

Local Rule 18 provides in part: "Motions for summary judgment shall include a concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried, with page reference to affidavits, depositions and other documentation. Failure

to include such a statement constitutes grounds for denial of the motion....."

RULE 56(f)

Rule 56(f) of the Federal Rules of Civil Procedure provides: "Should it appear from the affidavits of a party opposing the motion (for summary judgment) that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

M.G.L.A. Chapter 111B

M.G.L.A. Chapter 111B, section 3 provides in part:-"In this chapter the following words shall, unless the context requires otherwise, have the following meanings:-
'Incapacitated', the condition of an intoxicated person who, by reason of the consumption of intoxicating liquor is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or

damage property, or (4) disorderly."

M.G.L.A. Chapter 111B, section 8 provides in part: "Incapacitated persons; assistance to facility or protective custody - Any person who is incapacitated may be assisted by a police officer with or without his consent to a residence, to a facility or to a police station. To determine for purposes of this chapter only, whether or not such person is intoxicated, the police officer may request the person to submit to reasonable tests of coordination, coherency of speech, and breath."

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RICHARD T. HAYES AND LAURIE HAYES, Plaintiffs	)	
v.	)	CIVIL ACTION 86-3612-H
ERNEST BUTILIER, RICHARD JONES and the TOWN OF ORLEANS, Defendants	)	

ORDER

July 13, 1988

HARRINGTON. D.J.

Plaintiffs Richard Hayes and Laurie Hayes brought this action pursuant to 42 U.S.C. 1983 against the defendants the Town of Orleans, Ernest Butilier ("Butilier") and Richard Jones ("Jones"). Plaintiffs contend that the defendants are liable for violations of plaintiffs' civil rights and for the intentional tort of false arrest, false imprisonment, assault and battery and intentional infliction of emotional distress. The defendants move for summary judgment on all claims pursuant to rule 56 of the Federal Rules

of Civil Procedure.

On September 14, 1985 the plaintiffs were placed in protective custody by the defendant Officer Butilier. Officer Butilier contends that he reasonably believed plaintiffs were intoxicated. Plaintiffs contend that while in protective custody they were assaulted and beaten by Officer Butilier and Officer Jones. Plaintiff Richard Hayes was arrested for assault and battery on a police officer. Hayes was acquitted of all charges on May 20, 1986 in the First District Court of Barnstable.

The Court rules that the defendant Town of Orleans' motion for summary judgment is granted on the claim for violation of plaintiffs' civil rights. Plaintiffs have not met their burden under Celotex Corp. v. Catrell, 477 U.S.317 (1986), of going beyond the pleadings and by their own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Plaintiffs have failed to makea showing sufficient to establish hat the Town of Orleans

had a policy or custom of the city's policymakers that caused the plaintiffs to be subjected to the deprivation of constitutional rights. See Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978); Pembour v. City of Cincinatti, 475 U.S. 469 (1986). Municipalities may not be held liable under section 1983 on a theory of respondeat superior. Monell, 436 U.S.at 691-94 and n. 58.

Defendant Town of Orleans' motion for summary judgment on the intentional torts of false arrest, false imprisonment, assault and battery and intentional infliction of emotional distress is also granted. The Massachusetts Tort Claims Act excludes claims against municipalities based on intentional torts. See Mass. Gen. L. Ch. 258, section 10(c); Mellinger v. Town of West Springfield, 401 Mass. 188, 515 N.E.2d 584,589 (1987); Spring v. Geriatric Authority of Holyoke, 394 Mass. 274, 475 N.E.2d 727, 734 (1985).

Defendants Officer Butilier's and Officer Hayes' motion for summary judgment is denied.

Applying the objective reasonableness standard of Harlow v. Fitzgerald, 457 U.S. 80 (1978), there remain genuine issues of material fact whether defendant Butilier reasonably believed plaintiffs were incapacitated under Mass. Gen. L.Ch. 111B, section 8, when placing them in protective custody and whether the defendants used excessive force to subdue plaintiffs at the police station.

For the reasons stated above, defendant Town of Orleans' motion for summary judgment is granted. Defendants Butilier's and Jones' motion for summary judgment is denied.

SO ORDERED.

EDWARD F. HARRINGTON
United States District Judge

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 88-1928

RICHARD T. HAYES, ET AL.,

Plaintiffs, Appellants

v.

TOWN OF ORLEANS

Defendant, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

(Honorable Edward F. Harrington,
U.S. District Judge)

Before

Campbell, Chief Judge

Coffin, Senior Circuit Judge

and Fuste,[1] District Judge (Puerto Rico).

Robert S. Leo for appellants.
Kimberly M. Saillant and Richard Brody with whom Morrison, Mahoney & Miller was on brief for appellee.

March 2, 1989

Per Curiam. Appellants ask us to reverse the district court's entry for summary judgment for the Town of Orleans. Not only do we decline to do so, but, finding appellants' appeal wholly without merit, we award appellee double costs. Appellants claim that the Town may have had an unconstitutional policy, but cannot tell us the nature of the policy, much less any detail. Such generalized allegations are insufficient to defeat a motion for summary judgment. See Celotex Corp. V. Catrett, 477 U.S. 317 (1986). Appellants contend, however, that discovery and cross-examination, they may be able to determine whether the Town indeed had an unconstitutional policy. Even if we were inclined generally to allow for further discovery on the basis of such general allegations, appellants in this case have not submitted a Rule 56(f) affidavit and thus have forfeited their right to defeat summary judgment on the ground that further discovery is needed.

Affirmed. Double costs to appellee.